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Kek Siong Uteh v Aw Siew Keon

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-615–04 OF 2014
ALIZATUL KHAIR, ABANG ISKANDAR AND NALLINI PATHMANATHAN JJCA
17 FEBRUARY 2016

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Succession — Will — Invalid will — Whether suspicious circumstances surrounded making of second will by deceased following his marriage to appellant — Whether there was ample evidence before trial court to hold on balance of probabilities that impugned will invalid — Whether no cogent reason existed for appellate court to disturb findings of fact made by trial judge on the evidence

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The sole issue for determination in the instant appeal was whether a second will ('the impugned will') made by a businessman ('the deceased') after he had married the appellant was valid. The respondent, who was one of seven children of the deceased from the latter's marriage to his first wife (who had since died) brought an action in the High Court to declare the impugned will null and void and to declare an earlier will made by the deceased as his last will and testament. The respondent also sought to declare the marriage between the deceased and the appellant to be null and void and asked that damages be awarded against the appellant. The deceased had founded a family company ('the company') that traded in palm kernels and palm kernel oil. The deceased and two of his sons, including the respondent, were directors in the company. During his frequent trips to Indonesia, the deceased met the appellant and brought her to Malaysia when he was about 74 years old. Subsequently, a marriage between them was registered, apparently without his children's knowledge. Four years later, the deceased suffered a stroke that seriously affected his physical and mental abilities. The respondent claimed that about a year after the stroke, the appellant took the deceased away from the family home and his children never saw him again until he died about a year later. The respondent contended that it was highly suspicious that the deceased could have voluntarily made the impugned will making the appellant the sole executrix and trustee and sole beneficiary of his estate and totally ignoring his children who had helped him run the family business for 35 years. After a full trial, the High Court held there were suspicious circumstances surrounding the making of the impugned will and declared it invalid. The court also declared the marriage between the deceased and the appellant to be fraudulent and void (as she was legally married to another man at the material time) and ordered the appellant to pay the respondent damages. During the trial, the appellant failed to call evidence to rebut the testimony of a doctor ('SP1') who had treated the

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deceased following his stroke and found him to have been rendered physically weak, suffering from advanced dementia and impaired cognitive skills and to be mentally susceptible to undue influence and manipulation.

Held, dismissing the appeal, affirming the High Court's decision in declaring the impugned will as invalid but setting aside the order declaring void the marriage between the deceased and the appellant and the order granting damages to the respondent:

(1) The appeal turned primarily on the findings of fact made by the trial judge who was best positioned by reason, inter alia, of the audio-visual advantage he enjoyed, to assess, balance and evaluate the evidence adduced at trial. Such findings of fact were not lightly disturbed by an appellate court unless the appellant was able to show clear errors on the part of the judge in evaluating the evidence before him. In the instant case, the trial judge did not err in preferring the evidence of the respondent and his witnesses, particularly the medical practitioner, over that of the appellant and her solicitor who had drafted the impugned will (see paras 51 & 57).

(2) There was more than sufficient evidence on record to conclude that the decision reached by the trial judge was reasonable, plausible and likely on a consideration of the preponderance of the evidence. The trial judge did not err in concluding that the respondent had established his case, namely that the impugned will was invalid, on a balance of probabilities (see para 57).

(3) That part of the order of the High Court declaring the marriage between the deceased and the appellant as being void was set aside, as was the grant of damages, because the probate action was not the correct forum for a declaration as to the validity of the said marriage (see para 6).

[Bahasa Malaysia summary

Satu-satunya isu untuk penentuan dalam rayuan ini adalah sama ada wasiat kedua ('wasiat yang dipersoalkan tersebut') yang dibuat oleh ahli perniagaan ('si mati') selepas dia berkahwin dengan perayu adalah sah. Responden, salah seorang daripada tujuh anak si mati daripada perkahwinan si mati dengan isteri pertamanya (yang telah meninggal dunia) membawa tindakan di Mahkamah Tinggi untuk mengisytiharkan wasiat yang dipersoalkan tersebut adalah batal dan tak sah dan untuk mengisytiharkan wasiat terdahulu yang dibuat oleh si mati sebagai wasiat terakhirnya. Responden juga memohon untuk mengisytiharkan perkahwinan di antara si mati dan perayu adalah batal dan tak sah dan memohon bahawa ganti rugi diawardkan terhadap perayu. Si mati telah mengasaskan syarikat famili ('syarikat') yang dalam perniagaan isirong sawit dan minyak isirong sawit. Si mati dan dua daripada anak lelakinya, termasuk responden, adalah pengarah-pengarah syarikat. Semasa lawatan

kerapnya ke Indonesia, si mati bertemu dengan perayu dan membawanya ke Malaysia apabila dia berumur lebih kurang 74 tahun. Kemudiannya, perkahwinan di antara mereka didaftarkan, jelas tanpa pengetahuan anak-anaknya. Empat tahun kemudian, si mati mengalami serangan angin ahmar yang serius menjejaskan keupayaan fizikal dan mentalnya. Responden mendakwa bahawa lebih kurang setahun selepas serangan angin ahmar, perayu membawa si mati keluar daripada rumah famili dan anak-anaknya tidak lagi dapat berjumpa dengannya sehinggalah dia meninggal dunia lebih kurang setahun kemudian. Responden berhujah bahawa adalah ia amat mencurigakan yang si mati boleh secara sukarela membuat wasiat yang dipersoalkan tersebut membuatkan perayu satu-satunya wasi tunggal dan pemegang amanah dan benefisiari tunggal estetnya dan sama sekali tidak menghiraukan anak-anaknya yang telah membantunya menguruskan perniagaan keluarga selama 35 tahun. Selepas perbicaraan penuh, Mahkamah Tinggi memutuskan terdapat keadaan mencurigakan yang melingkungi pembuatan wasiat yang dipersoalkan tersebut dan mengisytiharkannya tak sah. Mahkamah juga mengisytiharkan perkahwinan di antara si mati dan perayu adalah pemalsuan dan tak sah (kerana pada masa material dia adalah isteri sah kepada lelaki lain) dan memerintahkan perayu untuk membayar responden ganti rugi. Semasa perbicaraan, perayu gagal untuk membangkitkan keterangan untuk mematahkan keterangan doktor ('SP1') yang merawat si mati berikutan serangan angin ahmarnya dan mendapatinya telah menjadi lemah dari segi fizikal, menderita daripada demensia yang sudah teruk dan skil kognitif yang lemah dan dari segi mental mudah terpengaruh kepada pengaruh tak wajar dan manipulasi.

Diputuskan, menolak rayuan, mengesahkan keputusan Mahkamah Tinggi dalam mengisytiharkan wasiat yang dipersoalkan tersebut sebagai tak sah tetapi mengetepikan perintah mengisytiharkan perkahwinan di antara si mati dan perayu batal dan perintah memberikan ganti rugi kepada responden:

(1) Rayuan berbangkit terutamanya atas dapatan fakta yang dibuat oleh hakim bicara yang dalam kedudukan terbaik atas sebab, antara lain, kelebihan pandang dengar yang diperolehinya, untuk menaksir, menimbang dan menilai keterangan yang dikemukakan semasa perbicaraan. Dapatan fakta sedemikian tidak dapat dicampur tangan oleh mahkamah rayuan kecuali perayu dapat menunjukkan kesilapan jelas oleh pihak hakim dalam menilai keterangan di hadapannya. Dalam kes ini, hakim perbicaraan tidak silap dalam memilih keterangan responden dan saksi-saksinya, terutamanya pegawai perubatan, daripada perayu dan peguamnya yang telah mendraf wasiat yang dipersoalkan tersebut (lihat perenggan 51 & 57).

(2) Atas rekod terdapat keterangan yang lebih mencukupi untuk memutuskan bahawa keputusan yang dicapai oleh hakim bicara adalah munasabah, boleh dipercayai dan berkemungkinan atas pertimbangan

terhadap banyaknya keterangan. Hakim perbicaraan tidak tersilap dalam memutuskan bahawa responden telah membuktikan kesnya, iaitu bahawa wasiat yang dipersoalkan tersebut adalah tak sah, atas imbangan kebarangkalian (lihat perenggan 57).

(3) Bahagian perintah Mahkamah Tinggi tersebut yang mengisytiharkan perkahwinan di antara si mati dan perayu sebagai batal diketepikan, seperti juga pemberian ganti rugi, kerana tindakan probet bukan forum yang betul bagi perisytiharan terhadap kesahan perkahwinan tersebut (lihat perenggan 6).]

Notes

For cases on invalid will, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2974–2975.

Cases referred to

Anderson v City of Bessemer 470 US 564 (1985), SC (refd)
Carlyle v Royal Bank of Scotland plc [2015] UKSC 13, SC (refd)
Clarke v Edinburgh and District Tramways Co 1919 SC (HL) 35, HL (refd)
Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd [2014] 1 MLJ 80; [2013] 9 CLJ 828, FC (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Henderson v Foxworth Investments Ltd and another [2014] UKSC 41, SC (refd)
Judah v Isolyne Bose AIR 1945 PC 174, PC (refd)
McGraddie v McGraddie and another [2013] UKSC 58, SC (refd)
Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka [2014] MLJU 1807; [2014] 9 CLJ 1064, FC (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97; [2002] 4 CLJ 90, CA (refd)
Thomas v Thomas [1947] AC 484, HL (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Yuill v Yuill [1945] P 15, CA (refd)

Appeal from: Civil Suit No 22 NCVC-54–05 of 2012 (High Court, Muar)

Manjit Singh Saini (R Krishnan Kutty & Co) for the appellant.
N Subramaniyan (Lum Chee Seng with him) (Lum Chee Seng & Assoc) for the respondent.

Nallini Pathmanathan JCA:

INTRODUCTION

[1] This sole issue which arose for consideration in this appeal was the validity of a will dated 9 December 2008 ('the impugned will') made by the late Ho Teng Sett @ Aw Bing Guan ('the deceased').

[2] The plaintiff/respondent ('respondent') is the son of the deceased who contested the impugned will by filing a probate action in the High Court in Muar, maintaining that an earlier will executed by the deceased on 4 January 1999 ('the first will') was in fact the genuine and valid will of the deceased.

[3] The appellant in this appeal, who was the defendant in the court below ('the appellant'), became the wife of the deceased in 2003. She was named the sole executrix and trustee and stands as the sole beneficiary under the impugned will dated 9 December 2008.

[4] In the court below the learned trial judge concluded, after a full hearing of the matter, that the impugned will was invalid and had been created at the behest of and for the sole benefit of the appellant. On the application of the respondent, further orders were granted including an order that the marriage between the deceased and the appellant was void, and an ensuing order for damages against the appellant.

[5] On appeal before this court, we concurred with the finding of the learned judge that the impugned will was invalid and dismissed the appeal in substance. The decision of the trial judge was therefore affirmed and upheld in relation to the declaration of the invalidity of the will.

[6] However, that part of the order of the High Court declaring the marriage between the deceased and the appellant as being void, was set aside, as was the grant of damages. This was because the probate action was not the correct forum for a declaration as to the validity of the marriage between the deceased and the appellant.

[7] In determining this appeal, it was evident that the issue of the validity of the will turned primarily on the factual matrix of the case. In this context the learned trial judge was best positioned to determine and make the requisite findings of fact. From a perusal of the appeal records and having read and heard submissions from learned counsel, there appeared to be no cogent basis for this court to intervene in its appellate capacity. The findings of the learned trial judge were premised on the evidence available to him and could not be said to

be implausible. Given the totality of the evidence on record, we were satisfied that there was no judicial misappreciation or evaluation of the evidence.

[8] We set out below our reasons for affirming the decision of the High Court.

SALIENT BACKGROUND FACTS

[9] Ho Teng Sett @ Aw Bing Guan ('the deceased') passed away on 22 November 2009 at the age of 80. His first wife, Tang Gek Ying, who was the mother of his children, had predeceased him on 31 December 1983.

[10] The respondent, Aw Siew Keon, is one of the deceased's childen. There are in total seven children of the deceased. The others who testified at the trial were a son, Aw Siew Boon ('SP7'), and a daughter, Aw Pin Pin ('SP3').

[11] The deceased was the founder of Sykt Tung Guan which operated as a manufacturer of copra and traded in coconut oil. Later that company grew to become Tung Guan Oil Mill Sdn Bhd and expanded its business to manufacturing palm kernels and trading in palm kernel oil.

[12] Tung Guan Oil Mill Sdn Bhd was a family business ('the company') which was incorporated in 1981. The deceased and his son Aw Siew Boon were the founding directors and shareholders of the company. Subsequently in 1984, the respondent was appointed as another director of the company.

[13] The respondent was responsible for the company machinery while his brother was a general assistant to the deceased, who maintained control over most of the operations of the company.

[14] Both the respondent and his brother received no salary for the first ten years or so that they were working at the company. After that, they were paid RM500 monthly, which was subsequently increased to RM2,000 monthly until the deceased passed away. The deceased was a very thrifty man who paid himself only RM2,500 per month as salary.

[15] The appellant, Kek Siong Uteh, is the second wife of the deceased. She is of Chinese descent and an Indonesian citizen. The marriage between the deceased and the appellant was registered on 8 May 2003.

[16] The respondent alleged that the children of the deceased were never informed of their father's remarriage and had all along thought that the appellant was their father's mistress.

[17] The respondent alleged that it was during one of his father's frequent visits to Sumatra, Indonesia, that the deceased became attracted to the appellant and brought her back with him. At that time, the deceased was 74 years old while the appellant was 30 years old. However, when his children questioned him about his relationship with the appellant, the deceased stated that he would not be so foolish as to marry the appellant. Furthermore, he told his children to call the appellant 'aunt' and not 'stepmother'.

[18] On 31 July 2007, the deceased suffered a stroke and was admitted to Hospital Pantai Batu Pahat. Dr Goh Teck Leong ('SP1') found that the stroke had caused the deceased to have gross impairment of his recent memory. The deceased changed in character and behavior after his stroke. He suffered from memory loss and could no longer sign cheques for the company.

[19] The children of the deceased became suspicious of the appellant when she started to behave as if she was the wife of the company's owner and tried to find out the status of the company's assets. She also frequently quarreled with Aw Pin Pin, the daughter of the deceased.

[20] On or about 3 September 2008, Aw Pin Pin conducted a check on the deceased's marital status and discovered the registration of the marriage between her father and the appellant.

[21] On 22 November 2008, the respondent and his siblings Aw Siew Boon and Aw Pin Pin discovered that the appellant had taken the deceased away. This was despite the deceased's ill health and memory failure. From that day, the three of them (with the exception of the respondent only on one occasion) did not see the deceased again until he passed away about a year later. The respondent and his brother Aw Siew Boon lodged several police reports regarding the deceased's disappearance.

[22] During the period of his disappearance, from 16 December 2008–3 January 2009, a considerable amount of the deceased's monies were expended, particularly through the use of his credit card. The expenditure was excessive, to the extent that after using fixed deposits he held to cover the expenses, there were still debts unpaid. The children of the deceased maintained that this was totally out of character for him, because the deceased had always been a thrifty man. The respondent and his siblings pointed to the influence of the appellant on the deceased, who had lost full control of his faculties since his stroke. They attributed this large expenditure to the appellant. The appellant denied the same, maintaining that the deceased acted voluntarily and independently.

[23] After the deceased had passed away, it was discovered that he had left two wills. The first was the will dated 4 January 1999 which was executed

before two witnesses, Haridas s/o C P Menon (a lawyer) and one Chong Fook Tong. The second will, ie the impugned will was dated 9 December 2008, and was drafted by another firm of solicitors known as Messrs Manian K Marappan & Co. The impugned will was executed in the presence of Manian K Marappan (a lawyer) and one Vijaya Kumari.

[24] On 18 January 2010, the appellant filed a probate petition based on the impugned will. Pursuant to the provisions of the impugned will the appellant stood to inherit 180,000 shares belonging to the deceased in Tung Guan Oil Mill. The impugned will also stated, somewhat incongruously, that the deceased's children were not faithful to him during his lifetime.

[25] The impugned will aroused the suspicions of the deceased's children as it was inconceivable that the deceased would ignore the contributions and interests of his own children who had assisted him in the running of the family business for 35 years, in preference to the interests of the appellant who had only recently become his wife. Compounded with this was his confused mental state arising from the stroke he had suffered, as well as the alleged manipulation of the deceased's mind by the appellant's continuous criticisms of his children.

[26] An investigation was carried out by the deceased's children. It revealed that although the appellant listed her marital status as 'widow' when registering her marriage to the deceased, in a letter dated 27 February 2003 left by the appellant on the premises of Tung Guan Oil Mill, the appellant's status was stated as 'never married before'. Besides that, from 16 October 2011–27 March 2012 the appellant's status in her hometown of Tanjung Leidong, Sumatra, Indonesia, was listed as 'married'. These conflicting versions available in relation to the appellant's marital status aroused the respondent's suspicions.

[27] He therefore entered a caveat on 9 June 2011. On 7 July 2011, the respondent filed an appearance to the warning to caveator issued by the appellant on 6 July 2011. On 2 May 2012, the High Court judge ordered the appellant's probate petition to be kept in abeyance for the respondent to file a writ of summons, ie the present action.

[28] The respondent filed this action seeking the following reliefs:

(a) a declaration that the last will and testament made by Ho Teng Sett @ Aw Bing Guan, the deceased, dated 9 December 2009 is null and void;

(b) a declaration that the marriage between Ho Teng Sett @ Aw Bing Guan and Kek Siong Uteh (the appellant) which was registered on 8 May 2003 is null and void;

(c) a declaration that the last will and testament made and executed by Ho Teng Sett @ Aw Bing Guan, the deceased, on 4 January 1999 is valid;

(d) the respondent be given the liberty to file a probate petition based on the last will and testament of Ho Teng Sett @ Aw Bing Guan dated 4 January 1999;

(e) alternatively, the respondent be given the liberty to file an application for letters of administration for the estate of Ho Teng Sett @ Aw Bing Guan, the deceased; and

(f) the appellant is to pay the respondent damages to be assessed.

[29] By consent, parties agreed that there was only one issue for determination at trial as stated at the outset, namely:

> Whether the will dated 9.12.2008 allegedly made by the late Ho Teng Sett @ Aw Bing Guan, who died on 22.11.2009, is valid under the law?

THE DECISION OF THE HIGH COURT

[30] The learned trial court judge, after a full trial concluded on the totality of the evidence before him that, after suffering a stroke on 31 July 2007, the deceased had suffered from dementia and the appellant had taken advantage of his weakened state to grab control of the deceased's assets. The High Court found that the will dated 9 December 2008 was null and void, since it was made solely for the benefit and interest of the appellant.

[31] The learned trial court judge went on to determine that the marriage between the deceased and the appellant was a fraudulent marriage since the appellant had hidden her real status when entering into the marriage with the deceased, ie that she was legally married to another man at the material time.

THE APPELLANT'S SUBMISSIONS

[32] In this court, learned counsel for the appellant argued that the High Court could not, and should not have granted the prayer for a declaration that the marriage between the deceased and the appellant was null and void. The issue before the High Court was only pertaining to the validity of the will and not on the validity of the marriage between the deceased and the appellant.

[33] The appellant's counsel submitted that the deceased had the requisite testamentary capacity to make the will dated 9 December 2008 and was not under the influence of the appellant at the material time. Therefore, it was contended that the will dated 9 December 2008 was the true and genuine last will and testament of the deceased.

[34] It was also contended that the High Court judge had erred in not taking into consideration a civil action filed by the deceased against his sons, ie Johor Bahru High Court Civil Suit No 22–893 of 2008 which was instituted to trace monies and assets misappropriated by the deceased's children. This, it was contended, was strong evidence of the fact that the deceased's relationship with his children had deteriorated to the extent that he chose to disinherit his children in favour of his new wife, before he passed away.

[35] On the issue of the children's apparent ignorance of the deceased's marriage to the appellant, it was submitted that it was implausible for the children to be unaware of the same given that the appellant had been living under the same roof as them for so many years, since 2003.

[36] It was submitted that the learned judge had erred in concluding that the deceased was taken away from home by the appellant. The learned judge ought to have concluded on the basis of the appellant's evidence that the deceased could not bear living with his children any longer and asked the appellant to follow him. Further, it is stated that the usage of the deceased's credit cards was for the living and medical expenses of the deceased and the appellant during the time they were away from home. The deceased would have also required money for legal fees in the making of the second will and the filing of the Johor Bahru suit against his sons. As such, learned counsel maintained that the learned trial judge had erred in relying on the expenditure pattern of the deceased after he left the family home to conclude that it was in fact the appellant who had manipulated the deceased into withdrawing or expending large sums of money.

[37] On the issue of the validity of the will it was submitted that the will, in accordance with the law, had to reflect and express the intention of the testator. It was also necessary that the testator be *compos mentis*, and comprehend precisely how and why he was making the provisions under the will. The deceased had the absolute right to bequeath his estate to whoever he wanted to and the court should not substitute the deceased's intention and rewrite the will based on views of what is thought to be just or morally right. No one can claim entitlement or legal right to the deceased's estate.

[38] The mental state of the deceased was also challenged by learned counsel vide the evidence of Dr Goh Teck Leong ('SP1'). Dr Goh had testified that the deceased's cognitive skills were impaired and that he was susceptible to influence. However, it was submitted that his evidence ought not to have been relied upon as he was a geneal practitioner, not a specialist.

[39] On the issue of the procedural and substantive validity of the impugned will, it was submitted that the evidence of Manian K Marappan ('SD1') on how the impugned will came to be prepared by him and executed by the deceased,

was unshaken. As such, the contention was that although the deceased may have suffered from physical infirmities, his mental faculties were unimpaired, such that he was, at the time of making the impugned will, mentally alert. In short, it was contended that he had the requisite testamentary capacity to execute the second will. It was further pointed out that the second will was made 5 1/2 years after the deceased and the appellant were married.

[40] Learned counsel for the appellant contended that the trial judge had judicially misappreciated the evidence when he failed to prefer the appellant's version of events relating to the deceased living the family home, over that of the deceased's children.

[41] In all the circumstances of the case therefore, it was submitted that the deceased was sufficiently *compos mentis* to determine that the impugned should replace the first will.

THE RESPONDENT'S SUBMISSIONS

[42] Learned counsel for the respondent in his submissions in reply sought to challenge the validity of the marriage between the appellant and the deceased. In summary, it was submitted that the appellant had failed to provide any cogent particulars to establish that she was divorced prior to the appellant registering her marriage with the deceased. Accordingly it was submitted that the marriage between the appellant and the deceased in Malaysia was a fraudulent marriage as the appellant had concealed her true marital status.

[43] In relation to the mental status of the deceased and whether he was compos mentis at the relevant time, it was submitted for the respondent that the evidence of Dr Goh was convincing because he had personal knowledge of the deceased's health and mental condition, having personally examined the deceased and treated him as a patient. His diagnosis of the deceased suffering from dementia at the fourth stage (out of a possible five stages) establishes that the deceased was not *compos mentis*. He was therefore susceptible to influence and manipulation. Learned counsel maintained that the deceased's mind was thereafter poisoned against his own children by the appellant. This was evidenced, inter alia, by a tape recording of a conversation between the appellant and the deceased that was secretly recorded.

[44] It was further submitted that suspiciously large sums of money were taken by the appellant from the deceased prior to his death. Reference was made to the deceased's credit card statements, which disclosed that a considerable amount of monies were expended to purchase jewellery. The appellant gave conflicting evidence about the said expenditure, at first saying that it was for jewellery for herself, then saying that she was not aware of so

much expenditure on jewellery, but in re-examination, altering her testimony to say that the jewellery was bought and then pawned for money for the deceased's daily expenses and medical expenses.

[45] The contention that the deceased needed to pawn monies to meet his daily expenses was challenged by learned counsel for the respondent who maintained that this could not have been necessary as Aw Siew Boon had deposited RM15,000 into the deceased's bank account on 19 May 2009 as payment of the deceased's salary from December 2008–May 2009. Further, the deceased's daily needs were taken care of by his children while he was living with them.

[46] In summary, it was contended for the respondent that the deceased could have had no intention to make a will benefitting the appellant since he had given her a house and sufficient money for her to live on.

[47] It was not possible for the deceased to have ignored the contribution and sacrifices made by the respondent and Aw Siew Boon for his benefit. It was contended that there was undue influence by the appellant over the deceased who lacked testamentary capacity, and there were suspicious circumstances surrounding the making of the second will. Accordingly, it was submitted that the second will be declared null and void.

THE DECISION OF THE COURT OF APPEAL

The law on wills

[48] The Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 stated that the burden of proof of testamentary capacity and due execution lies on the propounder of the will, while the burden of proof of extraneous vitiating element lies on the challenger of the will. In that case, Steve Shim CJ (Sabah and Sarawak) stated as follows:

> As regards the burden of proof, the Court of Appeal quite rightly stated the settled law ie, that where the validity of a will was challenged, the burden of proving testamentary capacity and due execution lay on the propounder of the will as well as dispelling any suspicious circumstances surrounding the making of the will; that the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lay with those who challenged the will.

[49] The Court of Appeal in the case of *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97; [2002] 4 CLJ 90 considered three authorities on testamentary capacity. The first was the Privy Council case of *Judah v Isolyne Bose* AIR 1945 PC 174, the second was *Williams on Wills* (7th Ed) and finally

the third was *Theobald on Wills* (15th Ed). Gopal Sri Ram JCA held as follows:

> It is clear from the foregoing passages, in particular from the passages in Theobald on Wills that suspicious circumstances in the context of wills relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator. In other words if the propounder of a will wishes to succeed in obtaining probate, he must upon challenge being taken establish (a) testamentary capacity and (b) dispel any suspicious circumstances surrounding the making of the will.

[50] From the above authorities it may be concluded that in this case, the appellant bears the burden to prove the testamentary capacity of the deceased and the due execution of the second will. The appellant should also dispel any suspicious circumstances surrounding the making of the second will. On the other hand, the respondent bears the burden of proving any extraneous vitiating elements to defeat the second will.

OUR FINDINGS

[51] This is an appeal that is largely fact-sensitive and therefore turns primarily on the findings of fact made by the learned trial judge. In this context, the law is trite that it is the trial judge who is best positioned, by reason, inter alia, of the audio visual advantage he enjoys, to assess, balance and evaluate the evidence adduced at trial. Accordingly, his findings of fact are accorded considerable respect and weight by an appellate court. Such findings of fact are not lightly disturbed unless the appellant is able to show clear errors on the part of the judge in evaluating the evidence before him. This may be established, for example, by a failure to consider relevant evidence, undue weight erroneously accorded to certain segments of the evidence and none to rebuttal evidence, a failure to make findings of fact and other instances of judicial misappreciation of the evidence as a whole. The list is not exhaustive and it is not possible to specify or encompass the various computations that could give rise to an error warranting appellate intervention under the head of judicial misappreciation of the evidence (see *Thomas v Thomas* [1947] AC 484; *Clarke v Edinburgh and District Tramways Co* 1919 SC (HL) 35; *Yuill v Yuill* [1945] P 15; *McGraddie v McGraddie and another* [2013] UKSC 58; *Anderson v City of Bessemer* 470 US 564 (1985); *Henderson v Foxworth Investments Ltd and another* [2014] UKSC 41, *Carlyle v Royal Bank of Scotland plc* [2015] UKSC 13; *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; *Merita Merchant Bank Singapore Ltd v Dewan Bahasa dan Pustaka* [2014] MLJU 1807; [2014] 9 CLJ 1064; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453; and *Conlay Construction Sdn Bhd v Perembun (M) Sdn Bhd* [2014] 1 MLJ 80; [2013] 9 CLJ 828).

[52] In the instant case however, on a consideration of the totality of the evidence it was clear that the learned judge had not erred in arriving at the conclusions he did. For example, there was ample evidence for him to conclude that the deceased was less than mentally fit. It is borne out by the evidence of Dr Goh who testified that the deceased had developed a stroke with left hemiplegia, meaning weakness over the left upper and lower limbs. As for his mental ability, Dr Goh described the deceased after examination as having very poor memory and lacking in concentration. He was also described as being very forgetful. The deceased was therefore clearly suffering from dementia at the time when the impugned will was created.

[53] There was no rebuttal evidence called by the appellant to meet Dr Goh's testimony. Given that Dr Goh had treated the deceased as a patient, there is no reason to doubt the veracity of his evidence. The existence of dementia coupled with his weakened physical abilities supports the finding that the deceased was not *compos mentis* when the impugned will was created.

[54] With respect to the impugned will, the learned trial judge accepted the evidence adduced by the respondent relating to 'suspicious circumstances'. There was sufficient evidence on record adduced by the respondent to establish that:

(a) the solicitor who had drafted the impugned will, namely Mr Manian K Marappan, was introduced to the appellant by one Daniel Tan @ Tan Kok Seng who assured the appellant that the impugned will could be prepared;

(b) the appellant's testimony was strange and evasive when questioned about the impugned will. She answered 'don't know'and 'disagree'when asked whether the deceased was under her control during this period. She also denied seeing the impugned will;

(c) Manian K Marappan represented the appellant in the petition for probate. She could not therefore be said to be ignorant of the impugned will;

(d) there were tape recordings of the appellant voicing concern about the deceased's will and the need to draft one. The appellant was primarily concerned that the deceased's daughter would try to stop the appellant from procuring the deceased to make another will in her favour;

(e) there was evidence from an earlier lawyer Ms Ang Hui Sin ('SP4') who testified that the sole purpose of the appellant bringing along the deceased to see her was to have a will done for the deceased but for the appellant to be named as the sole beneficiary to the exclusion of the deceased's children. This too establishes that the appellant was intent on procuring the deceased's assets for her own benefit and possession;

(f) there were credible inconsistencies in the evidence of the solicitor who drafted the impugned will and his wife who was the other witness for the will. These inconsistences were sufficient to throw doubt on the date of execution of the impugned will. The statement by the solicitor that it was on or around the 9 December 2008 is not borne out by the evidence of his wife or the security guard who testified that the deceased attended at the solicitor's office at the end of December, rather than the beginning. The inconsistency about the date of the will throws further doubt on the circumstances under which it was made and executed. The burden of proof in this context lies on the propounder of the will, namely the appellant in relation to the impugned will. A crucial element, namely the date of execution of the will therefore remains disputed and uncertain; and

(g) the solicitor, Manian K Mariappan ('SD1') insisted that the deceased came to his legal firm on two occasions aided by a walker, but alone. While this is substantiated by his wife and the security guard, it defies belief in view of the cogent medical evidence to the effect that he was suffering the effects of hemiplegia and had a poor recent memory, disorientation as to time and place and was unable to write and read properly and could not handle his personal affairs on his own. This remained unchallenged during cross-examination.

[55] As against this body of evidence, learned counsel for the appellant urged us to conclude that the trial judge had misappreciated the entirety of the evidence in failing to consider the crucial fact that the deceased was unhappy with his children, including the respondent, and had wished and willed to disinherit them, was proven by the fact that he had filed an action in Johor Bahru seeking to trace monies and assets misappropriated by his children. The primary thrust of this appeal was that the filing of the Johor Bahru suit in itself established conclusively that the deceased was angry with his children, did not trust them and wished genuinely to disinherit them in favour of his wife, the deceased being *compos mentis* at all material times.

[56] This contention however flies in the face of the evidence of the medical practitioner who treated the deceased and confirmed that he suffered from dementia. It also runs awry of the chronology of events and evidence available in relation to the deceased's somewhat peculiar behaviour towards the end of his life, after he suffered from a stroke.

CONCLUSION

[57] In these circumstances, it cannot be said that the learned judge erred in preferring the evidence of the respondent and his witnesses, particularly the medical practitioner, over that of the appellant and her solicitor who had

drafted the impugned will. There is more than sufficient evidence on record for this court to conclude that the decision reached by the learned trial judge was reasonable, plausible and likely on a consideration of the preponderance of the evidence. In short, we were satisfied that the trial judge did not err in concluding that the respondent established its case, namely that the impugned will was invalid, on a balance of probabilities.

[58] For the foregoing reasons, we dismiss this appeal. The order of the High Court is upheld save that the order is varied to the extent that we set aside the part of the order declaring the marriage is void and the High Court grant of damages. Specifically, prayers (ii) and (vi) of the statement of claim are not allowed.

[59] We grant the respondent costs of RM15,000 and refund the deposit to the appellant.

Appeal dismissed, the High Court's decision in declaring impugned will as invalid affirmed but the order declaring void the marriage between the deceased and the appellant and order granting damages to respondent set aside.

Reported by Ashok Kumar